THE COURT OF APPEAL

[214/18]

The President
Whelan J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT

AND

S. A.

APPELLANT

JUDGMENT of the Court delivered on the 11th day of March 2020 by Ms. Justice Isobel Kennedy

1. On 2nd April 2018, following a 42-day trial, the appellant was convicted in the Central Criminal Court on three counts of rape and 20 counts of sexual assault. The trial involved two complainants, who were sisters, CE and JE, who were 10 and 12 years, respectively, at the time of the alleged offences, which related to the period 3rd December 2010 to 11th March 2011.

The Factual Background

2. CE and JE and their two younger siblings, are the children of RE. They lived with their mother at various addresses in England from birth. The evidence at trial was that the children had different fathers, that RE lived in somewhat chaotic and reduced circumstances. She was known to social services in the UK in the context of parenting issues.

3. In 2010, the family were living in the Surrey area. CE, in her evidence, described their flat as "a mouse hole". At some stage in 2010, RE renewed acquaintance with the appellant who had been a long-time friend of her brother. The appellant would later intimate to Gardaí that he was a professional gambler and he gave the appearance of being a person of some financial substance, owning a valuable, substantial detached house in West Sussex. He was separated from his wife and the mother of his two children.

4. In 2010, when RE was experiencing difficulties with social services, the appellant invited her and her four children to come and live with him at his home. He provided a luxurious and lavish lifestyle, fee-paying schools, horse riding, stabling horses for them and furnishing a large number of expensive presents. In late 2010, social services in Surrey had been in contact with the West Sussex Social Services. Concerns in relation to accommodation were no more, but there were concerns in relation to SA's involvement

with the children, particularly concerns about personal grooming of the older girls such as bathing, *etc*.

5. In November 2010, social services had requested that RE and SA agree to a contract of arrangements which would involve the giving of undertakings relating to non-involvement of SA in the personal physical grooming of CE and JE

6. According to CE, SA picked her up from school one day, told her that he and her mother did not intend to agree to the conditions and that they were going to Ireland on holidays. At very short notice, the appellant, RE and her four children travelled to Ireland on 19th November 2010. They stayed at a number of hotels in the greater Dublin area and all expenses were paid by the appellant. On around 3rd December 2010, SA, after viewing properties in the County Louth area, rented a substantial detached house on its own grounds with gated security and stabling for horses.

7. Separately, SA had brought another single mother with children to Ireland and had installed them in a separate house very near to the first property. This was HP and she and her two children, BP and RP, had also made acquaintance with SA shortly before the move to Ireland.

8. The weather in December 2010 was unusually severe. This partly explained why RE was absent from the rented house for periods. On one occasion, SA, despite the very poor road conditions, travelled to Dublin in a taxi with CE for the purpose of retrieving a car left by RE at Dublin Airport. The evidence at trial was that the weather was so poor that SA and CE ultimately stayed at the Hilton Hotel in Dublin Airport that night, sharing a bedroom. CE told the jury at trial that during the night, SA raped and sexually assaulted her on two occasions.

9. On the first occasion, she described falling asleep watching a pay-per-view movie on television when she became aware that he was sexually molesting her and that he had raped her. She subsequently fell back asleep. She told the jury that the accused later told her that her mother had communicated her whereabouts to her English grandmother and relatives, and that as a result of their concerns, a request was made by the UK police to Coolock Gardaí to check on the appellant. The evidence was that Gardaí were not aware of any concerns about sexual impropriety, but simply went to the hotel to check on their presence. This the Gardaí did, and CE's evidence was that after the Gardaí had left, SA once more sexually molested her.

10. CE's evidence was that following the incidents in the Hilton Hotel, that SA had thereafter raped and sexually assaulted her on a number of occasions at the rented accommodation until the time when they were taken into care by Gardaí/Tusla on 13th March 2011. CE's evidence was that she, her sister, JE, and her other siblings all slept on the first floor of this substantial residence and that SA had his bedroom on the first floor also, beside the girls' bedrooms, while their mother occupied the entire second upper floor of the house. CE told the jury that on occasions, SA would come into her bedroom, would lie beside her on her bed and would scratch/rub her back and then would rape and sexually assault her.

She said that she did not tell her mother, or indeed anyone else about the abuse. However, after she went into care, she told another fostered girl, whom she felt she could trust, on 31st March 2011. This disclosure came about 18 days after CE went into foster care and led to Gardaí and Tusla being notified.

11. It may be of assistance to refer to contact between the social services in England and the HSE/ Tusla. It appears that after RE and SA had failed to present for an appointment with West Sussex Social Services, that the social worker, Mr. M, and colleagues became aware that there was a possibility that SA and the E family had moved to Ireland. A notification issued. There seems to have been some delay in referring the matter to a social worker, but in any event, a social worker, Ms. P, visited the rented house on or about 5th January 2011. She was unimpressed by what she saw despite the lavish accommodation. She was concerned that although the children had been in the jurisdiction since 19th November, none of the older children had been enrolled in school. She spoke with SA and indicated that if the older children were not placed in school, the authorities would have to become involved. SA said he would arrange for the children to be placed in school, but when the social worker, Ms. P, returned to the house on 21st January 2011, she was advised by the young, male housekeeper, , that the appellant, RE and RE's children had travelled to the United States to Disneyworld and were not due back until the end of January 2011. Apparently, because of Ms. P's intervention, the children were subsequently enrolled in local schools and started to attend school from early February 2011. It appears that SA arranged for the two younger children, J and M, to be placed in a private crèche facility in the Louth area.

12. The children were enrolled in school in February 2011. Some of the teachers and local parents started to notice what they felt was unusual behaviour in relation to the interaction between the appellant and JE. At trial, there was evidence from a number of teachers of having noticed SA kissing JE and/or handling her in an inappropriate manner. It appears that such was the unease on the part of some of the teachers, that they raised their concern with the principal of the school.

13. During the trial, the jury heard evidence by way of s. 16 DVD interviews conducted with both complainants. These interviews were conducted by specialist Garda interviewers.

The Events of March 2011

14. In March 2011, RE travelled to England to visit friends and left the children in the sole care of SA. On her return, on 6th March 2011, she was admitted to hospital in Drogheda for a relatively minor complaint. During the course of her hospital stay, she was visited by social workers, Ms. P and Ms. L, who expressed concern about the children being in the sole care of the appellant. By this stage, social workers were aware of concerns that had been expressed by teachers in the school and had also been in receipt of the notification from the British authorities. Social workers requested that RE agree to the children being put into temporary care during the period that she was an in-patient in the hospital, but this she refused to do.

15. The evidence at trial was that the appellant, in the company of HP and her two children, collected the children from their schools and crèches and then drove with the children across the border into Northern Ireland. They took up occupation in a rented house in County Down. Subsequently, RE made a complaint to Gardaí that her children had been taken out of the jurisdiction by the appellant without her consent and this gave rise to a nationwide appeal with a view to locating the four E children. The E and P children were located by the PSNI and SA and HP were arrested but released without charge. The P children were taken into care by social services in Northern Ireland. The E children were also taken into care of the PSNI and were then handed over to the custody in care of the Gardaí/Tusla and they were later placed in temporary foster care following Emergency Court Orders obtained by Tusla on 13th March 2011.

16. After SA and HP were released without charge by the PSNI, SA did not return to the rented house or to his substantial residence in the UK, nor did he stay in Northern Ireland. Instead, he travelled, in the company of HP, to South America and took up residence in Chile. Chile does not have an Extradition Treaty with Ireland. He left Northern Ireland sometime in the spring of 2011 and was not apprehended until he entered the United States of America in the summer of 2014 for the purpose of attending a gambling convention in Florida. His extradition was sought from the United States. He did not contest it, and on 24th July 2014, he was arrested following his extradition.

17. It will be noted that there was a significant period of delay in this case from the time the children were taken into care in March 2011, until the date of extradition on 22nd July 2014, and further delay until the trial date in January 2018. It may be noted that there were two earlier trial dates in 2016 and 2017, but both listings were aborted.

18. A number of grounds of appeal have been advanced, two of which were abandoned at the hearing of this appeal. The remaining grounds are:

    (i) That the judge erred in law by admitting the four DVDs of the specialist interview with JE.
    (ii) That the judge erred by refusing to excise portions of the DVD of the specialist interviews with JE.
    (iii) That the judge erred by refusing to excise a portion of the DVD of the specialist interview with CE.
    (iv) That the judge erred in permitting background evidence to go before the jury.
    (v) That the judge erred in refusing to withdraw the case from the jury in its entirety.
    (vi) That the judge erred in failing to properly warn the jury in respect of delay and corroboration.
    (vii) That the judge erred in allowing the replaying of certain portions of the DVD to the jury.
    (viii) That the judge erred in failing to adequately recharge the jury following requisitions.

(ix) That the judge erred in law by failing to give a stronger warning in relation to relevant press coverage.

Ground 1-The Admission of the DVDs of Interview with JE

19. The prosecution sought to introduce into evidence five DVDs of interviews with JE. All but the fifth and final DVD were admitted. Those interviews took place on the 29th August 2011, the 7th September 2011, the 26th September 2011 and the 9th October 2012. The first three interviews were conducted by Garda Yvonne Peoples and the fourth interview was conducted by Garda Peter O'Sullivan.

20. The challenge to the introduction of the DVDs, to a large extent focussed upon alleged breaches of established rules of evidence, and more particularly, the Good Practice Guidelines of 2003 (for persons involved in video recording interviews with complainants under 14 years of age (or with intellectual disability) for evidential purposes in accordance with section 16(1)(B) of the Criminal Evidence Act 1992, in cases involving sexual and/or violent offences.)

21. The issue of the admissibility of the DVDs gave rise to a lengthy *voir dire*. During that, the Court watched and considered the contents of the DVDs and there was evidence from the special interviewers, including evidence from Superintendent Eugene Brennan who was in charge of the investigation.

22. The appellant makes a number of complaints in respect of this ground:

(i) It is said that the effect of the admission of the DVDs was to give rise to an unfairness and was not in the interests of justice.
(ii) It is said that the recorded interviews were carried out without any appropriate enquiry as to the complainant's cognitive, educational, behavioural and/or psychological difficulties prior to interview.
(iii) That there was extensive, but undocumented contact and/or communication in non-controlled circumstances between the specialist interviewers and the complainant and between her co-complainant and foster family and this complainant, and/or between social workers and the complainant.
(iv) It is said that the recorded interviews were premised almost entirely upon pre-prepared statements of the complainant;
(v) That there was a real risk of improper influences, that the interviews could not be said to represent a free-flowing narrative and
(vi) That the interview process was unduly protracted and repetitive and the process was in breach of the guidelines.

23. So far as the point about the absence of an assessment is concerned, it is said that despite the fact that significant difficulties experienced by this 10-year old girl were outlined in a psychological report, focusing on educational difficulties, dyslexia, working memory difficulties and susceptibility/suggestibility, this does not seem to have been known to the specialist interviewers.

24. It is said that a further concern was the protracted nature of the process, both in terms of the timespan for the interview, but also the timespan for contact with specialist interviewer Garda Yvonne Peoples, which lasted over three years or more, to the point where this specialist interviewer was effectively acting in a dual role of Family Liaison Officer. It was submitted that what was involved here was presenting pre-prepared statements and converting them into direct evidence. It is said that in the present case, the complainant was attending for interview with statements that were pre-prepared in circumstances that were not entirely known, but which were certainly unsupervised and uncontrolled. It is argued that the interview process, which involved going through these letters, could not be said to be a free-flowing narrative.

25. It is further said that the delay that occurred was a reason for excluding the DVDs. It is said that the delay undermined the ability to cross-examine as the complainant would obviously not have the same ability to recall at the time the matter came for trial, some seven years after these issues emerged.

26. On behalf of the respondent, it is pointed out that what was in issue was that in advance of interviews, JE had prepared some short notes and drawings. The respondent says that the judge was entitled to take the view that this was not a breach of the rules of evidence or a breach of the Good Practice Guidelines. It is said that the judge was correct to take the view that the defence would have ample opportunity to cross-examine both complainants on all of the issues that had been ventilated during the *voir dire* before the jury. The respondent says that what has been described as pre-prepared statements were, in fact, very short childish notes in childlike handwriting and language which had been created by JE and given to Garda Peoples, the specialist interviewer. It is pointed out that on the first DVD, JE was visibly reluctant to speak about the appellant on camera and did not make any allegations against him on camera, even though ten days earlier, she had given Garda Peoples a note which contained the words "he had sex with me".

27. So far as the second interview is concerned, it is said that the appellant, in the course of written submissions, says that the first verbal disclosure of any sexual wrongdoing on the DVD interview came about only after specific utterances of particular words by Garda Peoples herself.

28. On behalf of the respondent, it is said that this is incomplete and misleading. What occurred is that Garda Peoples introduced the issue by asking the complainant why she is there, and it is in the context of what the child had already said in the note that the exchange identified took place. It is not the situation of Garda Peoples suggesting words to the child, but rather, Garda Peoples drawing the attention of the child to the contents of the note for the purpose of asking the child to elaborate.

29. On behalf of the DPP, it is said that for a Garda specialist interviewer not to encourage a 10-year old child to share the contents of her written notes and drawings, describing child sexual abuse that she had suffered, in circumstances where it was evident that the child was finding it very difficult to speak on camera and had provided the material as her way

of communicating with Garda Peoples would be to disregard and turn one's back on the very intention of the specialist interview process.

30. The trial judge, having heard extensive evidence on the issue in the course of the *voir dire*, concluded that the methodology employed by Garda Peoples was skilful and *bona fides*. The DPP rejects any suggestion of collusion or contamination in relation to the notes/drawings. This suggestion was advanced in circumstances where JE had said, both in her evidence on DVD and at trial, that she spoke to her sister about what happened and that her sister encouraged to write down and share what had happened to her and not to be afraid to do so.

31. In order to properly assess the complaints made concerning the interview process, this Court has taken the opportunity to view the audio video recordings of interview conducted with JE.

The Absence of an Appropriate Enquiry as to the Complainant's Cognitive, Educational, Behavioural and/or Psychological Difficulties Prior to Interview.

32. The overarching argument advanced by the appellant is that the admission of the DVDs of interview with JE was unfair and unjust. In support of that general proposition a number of arguments are made, and this Court is invited to examine those arguments separately and collectively.

33. The appellant contends that the specialist interviewers ought to have been aware of the content of the psychological report concerning JE prior to the interview process. This report set out various difficulties for her; specifically, educational difficulties, working memory difficulties and suggestibility and susceptibility.

34. The guidelines confirm the importance of planning for an interview and suggest that in explaining the purpose of the interview to a complainant, information from previous contact with the Gardaí or the health board may provide an indication of how a complainant may present at interview.

35. The stated main purpose of the guidelines is to assist those involved in the interview process. Garda Peoples had met with JE on a number of occasions and, it is clear from the interviews, had built a rapport with this young girl. It is readily apparent from viewing the audio video recordings of the interviews that JE presents as a shy and nervous child, but it is also clear that she has a clear understanding of the process. Even more fundamentally, it is crystal clear that Garda Peoples explains the process to her in an admirably suitable and age appropriate manner.

36. Moreover, the trial judge viewed the DVDs of interview, heard oral evidence and submissions before coming to his decision to admit the evidence. It is clear that he made a careful and considered decision on the evidence. This Court is in a different position than might be the norm, in that we also have had the opportunity to observe JE in her direct testimony and it is clear to us that the trial judge did not err in concluding that the witness was able to provide a coherent account notwithstanding her difficulties. The trial judge ruled on this issue as follows:-

"Now, again, and I want to make quite clear that it's for the purpose of this ruling only, and the Court has to form a view beyond a reasonable doubt as to the psychological state of JE and how she presented and the Court agrees totally with the assessment of her by Garda Peoples. I know she didn't have the psychological report at her disposal, but it's clear the Court has looked carefully at all the videos and looked at all the transcripts of evidence and there's no doubt that this child was exceedingly nervous. I've some difficulty in regarding her as of low intelligence. She struck me that she obviously had learning difficulties, but she struck me as someone who didn't strike me as being of low/average intelligence. She seemed to me to be a bright child. The Court concurs with I think it's evident on the video she was extremely nervous. I took the view, beyond a reasonable doubt again, that rather than rehearse some pre-coached allegation that she was extremely reluctant to speak about any allegation of impropriety on the part of SA. It was causing her particular concern to do so and there is no doubt that the assessment by Garda Peoples, that she was a very reticent interviewee is one which is borne out by the evidence adduced before the Court, both in relation to the viewing of the videos and in relation to the consideration of the transcripts."

Conclusion

37. We are not satisfied that there was any necessity in the circumstances for the specialist interviewers to conduct any of the suggested enquiries.

Pre-Interview Contact

38. A further argument is raised by reference to the fact that there was undocumented pre-interview contact between Garda Peoples and JE. This arises from the fact that Garda Peoples met with JE in her foster home on the 14th April 2011, no disclosures were made by JE on that date and Garda Peoples called to see JE on a number of occasions over the following months in order to get to know her. No notes were taken by Garda Peoples and no other person was present.

39. The DPP responds by saying that the judge was correct in finding that the guidelines were not breached in respect of two "rapport" meetings. The Director says that the judge was correct in assessing the interaction between the specialist interviewers and JE as "proper liaison" and points out that the judge did not accept the suggestion that the interviewers, and Garda Peoples in particular, has assumed a role analogous to that of a Family Liaison Officer. There was a sustained challenge to the admissibility of the DVDs of interviews conducted with JE.

Conclusion on Pre-Interview Contact

40. In our view it is clear that the judge approached the task of adjudicating on that issue with conspicuous care. He found that the procedure followed was not inappropriate. It must be appreciated that the guidelines are just that – guidelines, but those conducting interviews should be very slow to depart from the advices contained in the guidelines. The best practice, in our view, would be to make a brief note of what transpired after meetings of the kind which took place with JE and Garda Peoples. However, it must be appreciated that the circumstances in which there will be interaction with children or vulnerable witnesses may vary significantly, and there may be judgment calls as to how

to proceed. In this case, the judge categorised the role of Garda Peoples as skilful and *bona fides*. This Court would be slow indeed to demur from that observation.

Pre-Prepared Statements and the Risk of Improper Influence

41. Prior to the interviews with JE, on the 22nd August 2011, JE handed Garda Peoples notes and drawings; comprising two notes and five drawings. These notes and drawings substantially formed the basis for many of the complaints regarding the admission of the interviews with JE. The complaint made is that these items were prepared in advance of the interviews and were front and centre in the first and second interviews.

42. Further material was generated by JE during the course of the second interview; comprising of drawings and notes and prior to the third interview JE provided a further three letters, a drawing and what might be termed a mind graph.

43. Finally, prior to the fourth interview, JE furnished Garda O'Sullivan with a letter which was used in the course of that interview.

44. The gravamen of the complaint made concerning the interviews stems from these documents and their use during interview. It is said that the interviews were premised almost entirely on these documents, that there was a real risk of improper influence as the documents were prepared in advance. Moreover, that the interviews could not be said to consist of a free-flowing narrative in the circumstances and that the conduct of the interviews against that backdrop was in breach of the Garda Síochána Procedural Guidelines.

45. It is also said that the notes, letters and drawings were used in such a way so as to offend the rules of evidence. Specifically, that by using the content of the documents, Garda Peoples and Garda O'Sullivan asked leading questions and in effect sought confirmation of the content of the letters and notes, thus the narrative was in breach of the rules of evidence, was not free flowing and was tainted by improper influence.

The voir dire

46. The application to admit the interviews with JE into evidence took place over a period of some 10 days before the trial judge. The judge reviewed the DVDs of interview, heard oral evidence and legal argument, following which 4 of the 5 interviews were deemed admissible.

47. The relevant portions of section 16 of the Criminal Evidence Act 1992 provide as follows:-

> "16.-(1) Subject to subsection (2)-
>
> (a) [ ]
>
> (b) a video recording of any statement made by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person was competent for the purpose,

shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video recording mentioned in *paragraph* (b), either –

(i) [ ]

(ii) the person who statement was video recorded is available at the trial for cross-examination.

(2) (a) Any such video recording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the video recording concerned or that part ought not to be so admitted.

(b) In considering whether the interests of justice such video recording or any part thereof ought not be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused, if there is more than one, to any one of them.

(3) In estimating the weight, if any, to be attached to any statements contained in such a video recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise."

48. It is important to observe that this section permits vulnerable witnesses in our society alleging sexual or violent offences to give evidence in chief by way of interview recorded pre-trial. Furthermore, the section is directory in terms, that is to say, such evidence shall be admissible, unless a court is of the opinion that in the interests of justice the video recording or part thereof ought not be admitted. Finally, it is a prerequisite for the admission of this category of evidence that the witness must be available for cross-examination.

Interview of 29th August

49. The first specialist interview took place on 29th August 2011. This interview was conducted by Garda Peoples with Garda O'Sullivan as an observer. During the interview, Garda Peoples talked JE through the letters and drawings which she had handed over on 22nd August 2011.

50. One of the letters, Exhibit YP3, ended with the sentence "he had sex with me it wasn't my fault." When it came to discussing this letter JE was reluctant to discuss the statement: -

"A. I don't like the end part. I don't like people reading out the end part. I hate the end part, it's embarrassing."

Later on in the interview:-

"Q. Are you ready to talk about the last sentence?

A. No I'll write it down."

There were no disclosures made during this interview.

51. In the early stages of this interview, it is readily apparent that JE is a little girl who is nervous and scared. While this is evident from reading the transcript of the interview, it comes into sharp focus on viewing the video recording of the interview. A flavour of the demeanour of the child can be seen from the following exchange:-

"A. My heart's pounding still.

Q. Your heart's pounding?

A. But I'm getting used to it.

Q. You're getting used to it. And what's making your heart pound?

A. Just I get nervous.

Q. Okay?

A. Really nervous. But I'm getting good now.

Q. Okay, tell me about being nervous?

A. I just get really nervous, I'm nervous at school.

Q. Hm-hmm?

A. Nervous at parties, I'm nervous of a lot of stuff.

Q. You're nervous of a lot of stuff. But what is making you nervous today?

A. But now I'm getting better."

52. The complainant brought pen and paper with her to the interview and it is very clear both from the transcript and the video recording itself, that she is more comfortable with the written word rather than the spoken word. She clearly expresses that she does not like reading aloud to people and when the subject of the notes and drawings is raised in the interview, the child is clearly reticent about engaging in a verbal discussion.

53. The reference to drawing pictures and writing letters for Garda Peoples is raised after considerable time has been taken by general discussion designed to make the child more comfortable. JE confirms that she drew pictures and wrote letters which she gave to Garda Peoples.

Interview of 7th September 2011

54. The second specialist interview took place on 7th September 2011 and was conducted by Garda Peoples with Garda O'Sullivan as an observer. During this interview JE produced three A4 sheets of drawings and writing. On the first sheet was a depiction of JE, her siblings and her mother. The second sheet contained words written and some shapes and

pictures on it. And on the top of it, on the right-hand side it says JE's name, and then underneath that it says, "He (The appellant) means". The third sheet has JE's name written in the centre and then under that it said, "He had sex with me, the end."

55. They discussed the letters written on the 22nd August 2011. Again, the letter YP3 was brought up and again JE did not want to read the final line aloud. Instead, Garda Peoples agreed to say it:-

"Q. I'll not say it unless you're sure. If you don't want to talk—

A. Just say it really fast.

Q. Just say it really fast. "he had sex with me. The end"

A. I'm scared"

There were no further disclosures made during this interview.

Interview of 26th September 2011

56. The third specialist interview took place on 26th September 2011 and again was conducted by Garda Peoples with Garda O'Sullivan as an observer. Prior to the commencement of the interview, JE handed Garda Peoples five envelopes with letters and drawings which they discussed in the interview.

57. In relation to the letters, JE referred to CE as follows:-

"A. CE helped me write them and then I wrote them and CE helped me write them.

I spent ages playing with CE and talking to her"

She goes on to say:-

"A. CE helped me write the letter

Q. Okay

A. I told her and then I wrote it down. I said it to her first and then I wrote it down and she said are you going to write it down? And I said yeah, I am going to write it down."

58. In relation to the content of the drawings, the first drawing discussed depicted three figures labelled "SA" "me" and "BP" and "him having sex with me" was written at the bottom. When asked about the drawing she discussed: -

"A. That's SA and me.

Q. SA and you.

A. SA and me and BP"

Later on, she said:-

"Q. So you said him having sex with me and you've wrote on this SA, me and BP

A. Yeah.

Q. So tell me about that

A. I don't really remember but I just wrote it down because I remember some of it

Later on,

"Q. Tell me what's in the picture

A. SA, me and BP.

…

A. Getting on top of me.

Q. Okay and what do you mean by getting on top of you?

A. I don't really know, he's just getting on top of me.

Q. Is he standing on top of you, sitting on top of you?

A. Lying on top of me".

59. JE went on to detail that this occurred in the appellant's room in the house in Co. Louth while BP was asleep in the bed beside them.

60. The second envelope contained a letter exhibit KJ45B- In this letter the final paragraph said as follow:-

"I said can you get SA for me? And she said yes. I think he is asleep and then SA came out and picked me up. I said I need the toilet, I just wanted my friend. I went with him and he put me in his bed and started cuddling me. He said did you like it? I said yes. I didn't want to get a slap round the face. I had sex with him."

61. When questioned about it, JE stated as follows:-

"Q. But what is it? Did you like it. What did he mean? What was it?

A. Cuddling me and having sex with me. I didn't really like it but I didn't want to say no because he could have given me a slap round the face because he does that to Jon

Q. … tell me what happens when SA was lying on top of you?

A. Just going up and down

Q. Going up and down, okay. What was going up and down or who was going up and down?

A. SA

Q. SA was going up and down

A. And just hugging me and that's really all I remember

62. The next letter to be discussed stated as follows:

"To Yvonne, Let's begin again, I am very sorry. SA gave me wine and Malibu and coke. I should go to prison. And SA said to me if I tell anyone we will get told off. So I believed him and went along. He said the police and when he slept with me he would hug me. He will only have his boxers on. He will touch me. I felt really angry with him but I was scared to tell anybody. I would have nobody to talk to. I felt alone. When one of my cousins were around he was cuddling us and he made A go out of the room and said I need to talk to JE and getting on top of me and put his willy on my fanny and started going up and down and up and down and sometimes he sticks his willy in my fanny and then my fanny would hurt. It is called sex."

63. When talking about this letter, JE described the incident as occurring in the house in Co. Louth.

64. The third letter stated as follows:-

"To Yvonne, my mum asked me at the hotel did I sleep with SA. I went yes and said I did sleep with him and then I went to the bathroom. She said I will have a word with him and she said to him why did you sleep with her and he said I don't know why but she was sick and scared and then mummy said how many times did you sleep with her and he said two time but he was lying but he sleep with me five times—and put his tongue in and snogged me."

Interview of 6th October 2012

65. The fourth specialist interview took place on 6th October 2012 with Garda O'Sullivan and Garda Hough. Garda O'Sullivan gave evidence that this interview came about as a result of disclosures made by another child in an interview concerning the appellant. On the day of the interview, JE gave Garda O'Sullivan a letter consisting of two pages which detailed allegations of the appellant raping and sexually assaulting her.

Discussion and Conclusion

66. JE's reluctance to discuss the allegations are very evident in the course of the interviews. However, it is not the position that she did not partake in the process and simply agreed with the content of the notes and/drawings. There is no doubt whatsoever, that she found it extremely difficult to voice these sensitive issues. This is evidenced by the fact that at crucial points, she indicated she needed a break, that she was really scared or would change the topic of conversation. It is therefore clear that the material was used for a legitimate purpose, in our view, and that was to guide a vulnerable witness to a

position whereby she felt able to voice matters which she has previously committed to writing. While there were some leading questions asked by the specialist interviewers, for the greater part of the interviews, the evidence came from the child herself.

67. We are not satisfied that the material was in some way a pre-prepared statement of her evidence or that the complainant merely repeated a script which had been previously prepared by her or with the assistance of others. The material was used in order to assist her in discussing very difficult issues, similar to an aide memoire.

68. By virtue of the use of s.16 of the 1992 Act, the interview process is entirely transparent. The use to which the notes and drawings were put is apparent to all. The demeanour of JE and the approach adopted by the specialist interviewer was visible to everyone involved in the trial process.

69. The overall approach taken by Garda Peoples is neatly illustrated by how she deals with a situation which arises in the first interview. She asks if JE is ready to talk about the last sentence in one of the letters, that is to say that the appellant had sex with her, JE replies that she would write it down. She then immediately tries to divert the focus by talking about Garda Peoples' eye colour. The manner in which Garda Peoples deals with this demonstrates her professional and sensitive approach to this interview, and to the interviews in general, in that she takes her lead from the child and refrains from pursuing the issue.

70. It is apparent to us from reading the transcript and from viewing the videotape of the interviews that neither Garda Peoples nor Garda O'Sullivan sought to use the drawings or the letters in any manner whatsoever so as to put pressure on the complainant to speak of the allegations contained therein. Rather, the material was used to assist the child in verbalising her complaints.

71. Garda Peoples and Garda O'Sullivan's approach in the interviews is one of reassurance and stability. The specialist interviewers conducted the interviews with considerable skill and understanding. From our perusal of the transcript and a consideration of the videotapes of interview, we are not satisfied that the complaints made on behalf of the appellant are made out.

72. It is certainly so, that the use of the drawings, notes and letters was unusual and not one which is expressly contemplated by the Good Practice Guidelines, but one must not lose sight of the fact that the specialist interviewers were dealing with a nervous and scared child. The use of this material was at all times measured and circumspect with due regard for the anxieties and vulnerabilities of the witness and was within the letter and the spirit of s.16.

73. The Gardaí were confronted with a scared and nervous child which presents particular challenges for a specialist interviewer. It is clear that the child was reluctant to speak about certain issues, specifically the allegations concerning the appellant. A degree of

flexibility must be afforded to specialist interviewers in circumstances such as those that presented themselves.

74. Insofar as the contention of improper influence is made, this is partly predicated on the fact that JE refers to her sister CE in the interviews. She says, *inter alia*, that CE is very brave and that she talked and that she, JE, wanted to be brave also. Moreover, it is said on behalf of the appellant that the pre – prepared documents were compiled in unknown circumstances but one where a co-complainant was present and assisting.

75. We have carefully examined the comments concerning CE made by JE in interview and we do not draw from those remarks the inference asserted by the appellant. To imply collusion or improper influence from the comments is in effect inviting speculation. We are satisfied that the judge did not err in this respect.

Protraction of the process - Delay

76. The appellant submits that the delay between the examination in chief of the complainant in 2011 and 2012 and the cross-examination in 2018 has hindered his ability to effectively cross-examine the complainant as she does not possess the same level of memory recall. The appellant refers to *R v. Malicki* [2009] EWCA Crim 365 and *R v. Powell* [2006] 1 CR APPR 31 which support the proposition that where there is significant delay in the evidence of children, greater scrutiny of the evidence is required.

77. The respondent rejects the appellant's assertion as to delay as it is submitted that the defence of the appellant was not time or event specific: it was a blanket denial of the evidence.

78. Furthermore, as the Court in *The People (DPP) v. Rattigan* [2013] 2 IR 221 made clear, the concept of meaningful cross-examination does not mean the elicitation of answers which are pleasing to the defence, but rather that the witness is available to be asked questions which they may or may not be in a position to answer in the usual way.

79. The respondent further avers to the fact that part of the delay was of the appellant's own making as he had fled the country and any delay in the interviews with JE can have no bearing on the right of the accused to a trial of reasonable expedition in circumstances where in 2011-2, at the time of her specialist interviews, the appellant was outside the reach of this jurisdiction.

Discussion

80. It is important to look at the sequence of events from 2011. In March of that year, the complainants' mother RE travelled to the UK leaving the children with the appellant. When she returned, she was hospitalised and visited there by two social workers who had concerns regarding the children being left in the sole care of the appellant. It seems that RE contacted the appellant and requested that he take the children to Dublin. It seems then that the children, the appellant, a Ms. HP and her children travelled to Northern Ireland. Thereafter the PSNI arrested the appellant and Ms. HP, who were interviewed and released without charge.

81. The interviews with CE were conducted on the 20th April 2011 and the 25th August 2011. The interviews with JE took place on the 29th August 2011, the 7th September 2011, the 26th September 2011 and the 9th October 2012. The fifth interview in 2014 with JE was deemed inadmissible by the trial judge.

82. On being released without charge, the appellant took up residence in Chile and was apprehended in the summer of 2014 when he travelled to the United States, an extradition warrant was executed and the appellant was arrested on the 23rd July 2014. Two trial dates were vacated due to outstanding disclosure.

83. While a period of some three years passed between the dates of the interviews with the complainants and the date of the appellant's arrest in 2014, this delay was due to the appellant's absence from this jurisdiction. The trial dates in 2016 and 2017 were adjourned due to outstanding disclosure. It is a feature of cases of this nature, where there is an involvement with various agencies, that disclosure may be voluminous.

84. A further period of some three and a half years passed before the matter proceeded to trial in January 2018.

85. It is unfortunate that time passed between the interviews with the children and the trial, leading to a period in excess of some six and a half years between the interviews and the cross-examination. For three of those years the appellant was not in this jurisdiction, while that was entirely within his rights, as he was not facing any charges, nonetheless, he cannot now complain of prejudice in cross-examination in that respect.

86. Moreover, this was a case where the appellant denied the allegations in broad terms. It was not one, as put by the respondent, which was date or event specific.

87. Furthermore, it was common case that he resided with the children and their mother at the relevant locations.

88. It is clear from the transcript of the proceedings before the Central Criminal Court that the cross-examination of each complainant was skilful and fulsome. We are not satisfied that the passage of time rendered the process unfair or impacted negatively on the ability of the appellant to cross-examine the witnesses.

Conclusion on Ground 1

89. The provisions of the Act provide safeguards for an accused person and a trial court must be diligent to ensure that the evidence not be admitted if the court is of the opinion that in the interests of justice the video recording or part thereof ought not to be admitted and in this regard, the court must also have regard to all the circumstances to include any risk of unfairness to the accused person if it be admitted.

90. We are satisfied for the reasons stated above that the criticisms made on behalf of the appellant regarding the admission of the DVDs are without foundation and that the trial judge did not err in admitting the DVDs of interview in evidence. The trial judge took scrupulous care in the manner in which he addressed the issues which arose.

Grounds 2 and 3 - Refusal of the Trial Judge to Excise Portions of the DVDs of CE and JE

The Appellant

91. On behalf of the appellant, it is said that having wrongly admitted the DVDs, the judge further erred in failing to edit and to excise therefrom certain portions. It is said that these elements should not have been admitted as the probative value was outweighed by the prejudicial effect.

92. So far as CE is concerned, it is said that the judge was in error in failing to excise the following references:-

Interview 1: 20th April 2011

- A reference to the involvement/scrutiny and/or alleged intention of the appellant to avoid social services.
- A reference to the presence of co-complainant, JE, and another child, BP in bed with the appellant in Northern Ireland.
- Reference to an alleged plan of the appellant to abduct or escape with the E and P children.

Interview 2: 25th August 2011.

- A reference to an alleged plan of the appellant to abduct or escape with the E and P children.
- Reference to certain feelings of CE.
- Reference to the involvement/scrutiny and/or alleged intention of the appellant to avoid social services.
- Reference to motive on the part of the appellant in respect of the E family.

93. So far as the interviews with JE are concerned, it is said that the errors were as follows:

Interview 3: 26th September 2011.

- Reference to another child, BP, being present in the appellant's bed
- Reference to lots of cash in the appellant's safe.
- Reference to another child, A, being in the same bed as the appellant and JE.

Interview 4: 9th October 2011.

- A Reference to BP in the appellant's bed.
- Further reference to another child, A, in the same bed as the appellant and JE.

The Respondent

94. In response, on behalf of the DPP, it was pointed out that there was in fact agreement between the two sides leading to significant editing. The written submissions refer to the removal of significant swathes of material. It is said that in relation to the material that remained in dispute, the judge approached his task in a very considered and detailed analysis of the material. After a full consideration, he ruled that any extraneous prejudicial material which was not relevant to the charges should be excised.

Matters in Dispute

95. It is said, however, in relation to the matters that remained in dispute, that the judge's approach was fully justified. It is submitted that background evidence in relation to how the appellant involved himself with the E family in Britain and later in Ireland, how RE distanced herself from the lives and care of her children, how the appellant was unwilling to remain in his property in Britain because he was requested not to bathe or physically groom the older girls, how the family came to the scrutiny of social services in this jurisdiction and the removal to Northern Ireland were all clearly relevant to the jury's understanding of the complexed, nuanced, and indeed, unusual factual matrix.

96. In relation to the reference to BP asleep on the bed, it is said that the judge's ruling was clearly correct. It is said that to have done otherwise, would have been to ask the witness, on cross-examination, to contort and effectively manufacture evidence. The judge ruled on this by saying "the Court is of the view that it would represent an unreal situation if it was not left in and the jury would be left with an incomplete and incomprehensible account in relation to the particular issue of that allegation".

97. In relation to the evidence regarding CE 's feelings, she had described her relationship with the appellant as "princess by day: abused by night". It is said that to exclude what she had to say about the context and nature of the relationship would involve a distortion of the evidence. The DPP says that the material which the appellant contends should have been excluded satisfied the tests of relevancy and necessity, as identified in the *McNeill* case.

The Respondent

98. The DPP says that the background evidence called was very limited, and to the extent that it was, was both relevant and necessary in order to explain the factual matrix and to paint a picture of the relationship between the complainants, SA, RE and the wider family.

99. It is submitted on behalf of the respondent that in order for the jury to appreciate the unusual and complex relationship which existed within the E family, and their involvement with the appellant, it was necessary to refer to the complex background from England. In that regard, SM, social worker, gave evidence in relation to concerns by social services in the UK in relation to RE's parenting skills and about SA's involvement in the physical grooming of the older girls. Mr. M's evidence was relevant to explain the sudden trip to Ireland. That evidence tied in, in a very significant way, with the evidence of the two complainants who said that they had been told by SA that he had no intention of agreeing to the plans formulated by the social workers in England in November 2010, and that he and their mother, RE, intended to leave the UK rather than comply with what was being proposed. It is said that the evidence of S.M, therefore, performed a dual function. It provided essential background evidence, which was both necessary and relevant, if the relationship between SA, the children and their mother was to be understood, but secondly, it also provided a supportive framework through which the jury could assess the evidence of the two complainants in relation to what they told the Gardaí about what had been said to them about the involvement of S.M. by the appellant.

Discussion

Interviews with CE

• These include references to social services involvement and the alleged intention of the appellant to avoid social services.

• References to an alleged plan of the appellant to abduct the children

• The emotive evidence

• Reference to JE and another child being in bed with the appellant.

The Interviews with JE

100. A significant amount of time was dedicated to the consideration of material to be excised from the interviews of JE. On this point the appellant takes issue with several instances where the trial judge refused to excise the relevant material. The relevant impugned portions relate to references to the presence of other children:-

• Firstly, there were several references to another child; BP, and JE's description that she was in the appellant's bed asleep while he abused JE.

• There was also reference to another child A, being present in the same bed as the appellant and JE and she was told to leave by the appellant

• There was a reference to a lot of money in the appellant's safe.

101. *The People (DPP) v. McNeill* [2011] IESC 12 is the leading authority in this jurisdiction concerning background evidence wherein Denham J. stated at para 49:-

> "Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior to the offences charged. Background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence was admitted, the evidence before the jury would be incomplete or incomprehensible. Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible"

102. The trial judge conducted a very careful analysis of the impugned material and excluded extraneous prejudicial material. The issue concerning the admissibility of the material was the subject of a very lengthy *voir dire* and without doubt the ruling by the trial judge was of the most careful and considered kind.

103. The test to be applied in considering whether background evidence should be permitted is whether the material is relevant and necessary. The purpose for the admission of the evidence is crucial. Therefore, it may be that even where evidence tends to show the commission of offences, apart from those charged, nonetheless such evidence may be admissible in the particular circumstances of any given case, if such evidence is relevant and necessary. It may be that evidence is necessary in order to render the factual matrix

in a case complete and comprehensible. A case cannot be decided in a theoretical vacuum.

The Appellant's Involvement with the Family

104. This material concerned the appellant's involvement with the family, the decision to move to Ireland, moving at short notice, the attitude of the complainants' mother and the involvement of the social services both in the UK and in this jurisdiction.

105. The argument advanced by the respondent was that this evidence was relevant and necessary to enable the jury to understand the complex factual matrix leading to and surrounding the allegations in question, without which the jury would have been deprived of the complete picture.

106. Firstly, we observe that the trial judge adopted a very careful forensic approach to the material. He analysed each aspect of the impugned evidence and permitted certain material to be adduced in evidence, whilst ordering that other material be excised. As regards each block of material, he explained his reasons for admitting or rejecting the evidence.

Conclusion on the Material in the Interviews

107. We can find no error in the approach of the trial judge. The appellant's motive in involving himself with the complainants' family was highly relevant background evidence and necessary to enable the jury to consider the entire factual matrix which included the background to the arrival of the family in this jurisdiction. The fact that that included references to a desire on the part of the appellant to avoid scrutiny by the social services, while somewhat prejudicial, was highly relevant, probative evidence.

108. The evidence regarding the dynamic within the family, including the conduct of the mother was properly, in our view, considered by the judge to be admissible evidence.

109. When the trial judge addressed the concerns regarding CE's emotions, he specifically identified the impugned material. We do not intend to rehearse that material save to give one example of the care taken by the trial judge. This concerned CE's evidence that the appellant treated her as a 'princess' during the day and abused her at night. She stated that the appellant, in effect, did everything she wanted during the day in return for abusing her at night. The judge properly considered this material as directly relevant to the allegations and with this we entirely agree. The balance of the material relating to CE's emotions was, as found by the trial judge, without doubt relevant and therefore admissible evidence.

110. As regards the references to the child BP, we again are wholly satisfied that the trial judge did not err in his ruling in permitting this evidence. The excision of this material would have distorted the evidence. The evidence involved the use of a drawing by JE wherein she depicted another child; BP in circumstances where JE alleged that she was sexually assaulted while BP was asleep in the bed. The evidence concerning the presence of BP was inextricably bound up with the allegation. Moreover, the trial judge indicated he would make it quite clear to the jury that there were no allegations regarding BP.

111. Whilst the submissions refer to the child A and a sum of cash, it seems from Day 15 of the transcript that many of the impugned references to the child A were excised by agreement. Moreover, it appears that the appellant canvassed one issue with the trial judge which primarily concerned the material relating to the child BP. The issue turned on the presence of another child in the bed. Insofar as this related to child A, the material in the interviews involved a request from the appellant to the child to leave the room following which, he assaulted JE. We can find no error in the trial judge's ruling regarding the impugned material.

Ground 4 -The Background Evidence.

Agreed Formula

112. It is contended that the judge erred in permitting background evidence, the observations and/or opinions of social workers and school and crèche personnel to go before the jury. A formula was agreed between the parties designed to neutralise prejudicial material, in particular, that the complainants were essentially to be kept under surveillance. British social workers, and in particular, social worker, S.M, had made contact with L.P., a social worker with the HSE, succeeded by A.H. They communicated concerns to the school and crèche where the E children attended. The formula agreed was that the jury would merely hear that a communication had arrived from England which led L.P. to communicate to the schools in question to keep an eye on the girls.

113. The appellant advances the argument that the background evidence of social workers, teachers and creche personnel ought not to have been admitted as such evidence was highly prejudicial to the appellant and that the cumulative effect of the evidence rendered the appellant's trial unfair.

114. The evidence concerned the interactions of the above witnesses with the appellant and, on occasion the observation of his conduct towards JE, most notably, when the school principal, observed him kissing JE on the lips and the evidence of JO'H, a teacher, concerning that incident; where he was permitted to say how inappropriate this seemed to him. It is said there was evidence of the fact that RE had been charged in relation to neglect. It is reiterated that the evidence might not have been sufficient, of itself, to render the appellant's trial unfair, but it is said that the cumulative effect of the evidence was significant and should have impacted on the application to withdraw the case from the jury.

115. Other evidence related to the complainants' sister's condition in the crèche she attended. Further evidence included that of criminal proceedings for neglect in respect of the mother of the complainants.

116. Objection was also made to the evidence of social worker, SM (UK). It should be said that this evidence focused on the interaction between the appellant, the mother and the social services in the UK together with remarks attributed to the appellant on those occasions.

Discussion

117. Addressing the latter issue first, it seems to this Court that the evidence from Mr M fell within the principles enunciated in *The People (DPP) v. McNeill* [2011] IESC 12 in that it was both relevant and necessary to enable the jury to comprehend the relationship between the complainants, the mother and the appellant. The trial judge again forensically considered the statements to which the appellant raised objection and addressed the material to which objection was raised line by line. We do not intend to do likewise at this juncture, but we are of the view, having considered the transcripts of evidence and in particular the ruling on Day 30, that the trial judge permitted only admissible material to be adduced which directly bore on relevant issues in the trial.

118. Insofar as the evidence of JO'H is concerned, there can be no doubt but that this evidence was admissible, indeed, it was accepted on behalf of the appellant that it was admissible evidence. To this Court, where an appellant faced charges of sexual abuse, evidence, as given by AM, school principal, that the alleged assailant kissed the 10-year-old complainant on the lips in plain sight is clearly probative evidence. The evidence concerning the assessment of that conduct was also admissible in the circumstances of the case.

Conclusion

119. We have assessed the impugned evidence and the ruling by the trial judge. Yet again, the judge delivered a carefully considered ruling. The evidence adduced was clearly relevant and necessary in terms of the test in *The People (DPP) v. McNeill* [2011] IESC 12. It was, in the circumstances of the case, necessary for the jury to understand the manner in which the appellant became involved with the family, the standard of care received by the children from their mother, the involvement of the social services and more particularly the appellant's conduct in respect thereof and his attitude to the social services. The behaviour of the appellant towards the complainants and his interactions with various persons, all this was relevant and probative material and properly admitted in evidence. The trial judge scrutinised the evidence to which there was objection and was satisfied that the evidence met the twin tests of relevance and necessity in the circumstances of the case, justifying its admission in evidence. Moreover, care was taken in the manner the evidence of the social workers was adduced through the measure of an agreed formula, thus ensuring a fair trial.

Ground 5 -The Decision of the Trial Judge not to Withdraw the Case from the Jury

120. Following the close of the prosecution case, there was an application to withdraw the case from the jury in terms of *R v. Galbraith* [1981] 1 WLR 1039 and to stop the trial, relying on *PO'C v. The DPP* [2000] 3 IR 87, and *JO'C v. The DPP* [2000] 3 IR 487. It is said that the lack of recall on the part of the complainants meant that there was a real inability to cross-examine in a meaningful fashion. It is said that this level of inability to recall, along with the inconsistencies that emerged, and the real risk of third-party influence, were such as to satisfy the tests in *Galbraith* and P.O'C.

121. Moreover, it is contended that the trial judge erred in failing to stop the trial in exercise of the court's inherent jurisdiction where there is a real risk of an unfair trial on the basis

of delay and specific prejudice arising from delay and the inability to cross-examine the witnesses in a meaningful manner.

122. So far as the evidence of CE is concerned, it is pointed out that she could not remember when the abuse started or when it ended. She accepted that she had given three different accounts of the incident in the Hilton Hotel and then gave a further one. She explained omissions on the recording by saying that she was, at the time of the recording, trying to forget everything that had happened.

123. The appellant points to a series of matters raised in the transcript and says that in respect of a number of these, CE had no clear recollection as to the details of the events and that her memories were inconsistent. Again, a list of matters not remembered by JE are identified.

124. In addition, insofar as CE is concerned, the appellant contends, *inter alia*, that she had no recollection of meeting various people, including social workers, and no recollection of certain discussions or conversations. The appellant relies on many occasions in cross-examination when CE was unable to recall the general details surrounding, and directly relating to the incidents in the Hilton Hotel.

125. Concerning JE, it is contended that meaningful cross examination was impossible as JE was unable to recall inter alia general details of the relevant period, conversations and discussions with various people, including Garda Peoples or details of the layout of the rented house in Co. Louth. Reliance is placed on her twice responding that she could not recall aspects of the interviews recorded on DVD due to the lapse of seven years.

126. The Director responds, as one would expect, by saying that the inconsistencies alleged by the appellant to arise are matters that were solely within the province of the jury. She contends that the jury were well-positioned to engage in an assessment of the credibility and reliability of the two complainants. They were in a position to do so, not only by reference to their own testimony, the DVDs and cross-examination, but also by reference to the testimony of others which provided support, instancing in this regard the evidence as to the Hilton Hotel.

127. The Director refers to the comments of McCarthy J. in *The People (DPP) v. Egan* (Unreported, Supreme Court, 30th May, 1990) where he said:-

> "Save where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it. The concepts of lurking doubt, feel of the case, gut feeling, or back of my mind, are foreign to the judicial role as I understand it. "

128. She also relies on *The People (DPP) v. PC* [2002] 2 IR 285 wherein the Court refused to set aside the verdict of the jury despite accepting that there were criticisms of the complainant's evidence. In so doing, the Court stated that there was evidence to support a guilty verdict and emphasised the role of the jury:-

"For the purpose of assessing the credibility of that evidence, the court has no more than the transcript and associated exhibits. Evidently, it has not had the opportunity of observing the complainant or other witnesses give their evidence. The assessment of the credibility of the witness and the weight to be attached to such evidence is manifestly within the province of a jury in a criminal jury trial."

129. Finally, the Director relies on the recent decision of this Court in *The People (DPP) v. JM* [2015] IECA 65, where Edwards J. reiterated the primacy of the jury in a criminal trial and the concept of fairness.

Discussion

130. It must be said that the arguments were advanced extensively before the trial judge over a period of three days and are set out in considerable detail in submissions which we do not intend to rehearse in any more detail.

131. The trial judge refused to accede to the application and stated his reasons for so doing in some detail given the complexity of the case and the arguments advanced. He considered the evidence in the context of the submissions made and the legal principles. He properly assessed the entirety of the evidence in the trial in his consideration of the application to withdraw the case from the jury and concluded:-

"…in my view, the defence have not in any way discharged the and I'll put it not--not a huge onus on them, but an onus on them to highlight any issues of specific prejudice which would allow this case to be withdrawn from the jury on that particular way.

Now, and I'll combine that with the other issues which have arisen. I disagree that there was a lack of meaningful cross examination. In any event, I don't know how the Court could deal with that issue by withdrawing it from the jury. Ms Biggs on behalf of her client conducted lengthy cross examinations of CE and JE. And both of them answered the questions, there were certainly gaps in that they couldn't remember, and that there were difficulties in relation to that.

In relation to the incidents around the Hilton Hotel, I fundamentally disagree that there were no islands of fact in relation to that issue. There was substantial evidence tendered in respect of it and quite specific evidence and those are matters ultimately for the jury. I accept that there is a difficulty there, there's no doubt that there's a genuine difficulty there, and the question that I framed to Ms Walley, where there's a combination of seven years, a DVD when they're children, and they're giving evidence when they're close to adult hood. But the Court can't guarantee a perfect trial, the Court must guarantee a fair trial. And those are the realities of this particular trial and they certainly don't merit withdrawing it from the jury. But there are matters which the jury are quite entitled to take into consideration, and if they feel that it doesn't measure up to proof beyond a reasonable doubt, they're entitled to bring in not guilty verdicts in relation to the issues.

That's a matter, it's a legitimate matter and it's a matter for the jury. But in terms of that there's a guarantee of islands of fact in an allegation of child sexual abuse which the fundamental act itself is more than likely to take place in secret, in my view is not part of Irish law. Now, I then go on to the specific counts. Now, I am satisfied in general that the evidence adduced by the prosecution in relation to CE, the allegations in the indictment generally speaking are not vague, are not tenuous, they don't come in either under the first or second leg of Galbraith. They are quite able to be dealt with by the jury."

132. Moreover, he found himself satisfied that there was no collusion or influence or between the complainants. In so finding he said:-

"But if I thought for one minute there was any collusion between these children in relation to the preferment of evidence, this case would have to be withdrawn from the jury. But if you look at the demeanour of the children on the DVD, you know they struck me as guileless, innocent children in many ways. And I, in those circumstances, I'm --- and it wasn't put frankly to CE that that was the type of behaviour that she was engaged in."

133. Moreover, he was satisfied that while there was the possibility of innocent contaminations, this was foursquare a jury issue.

134. It is well established that matters relating to the credibility and reliability of witnesses are within the province of the jury. The well-known decision of *R v. Galbraith* [1981] 1 WLR 1039 is not support for the contention that a case must be withdrawn from the jury if the prosecution's case contains inherent weaknesses, is vague or has significant inconsistencies. Edwards J. in *The People (DPP) v. JM* [2015] IECA 65 emphasised the correct legal position in that respect and stated:

"On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith wasn't even if the prosecution's evidence contains inherent weaknesses, or is vague, or contain significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of the case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

Conclusion

135. The mere fact that there are inconsistencies in a case is not an indication that the case ought to be withdrawn from the jury. It is of course the position that if there is such a level or degree of internal inconsistencies which raise serious questions as to the credibility of the prosecution evidence, that no jury properly directed could convict, a trial

judge may withdraw the case from the jury. However, that is not the case here. It is undoubtedly the position that there were inconsistencies in the evidence of the complainants, but we are satisfied that the trial judge was absolutely correct in his determination that those areas of inconsistency were matters relevant to issues of reliability and credibility and thus were within the sole province of the jury. The trial judge properly considered the evidence as a whole and in his ruling identified evidence aside from the evidence of the two central witnesses. He was not of the view that the defence had been denied meaningful cross-examination of either of the central witnesses. In this we also find no fault on the part of the trial judge, on our consideration of the transcript it is quite clear that counsel for the appellant cross-examined both witnesses extensively and with some considerable skill.

136. Moreover, the trial judge was in the best possible position to assess the demeanour of the witnesses and very carefully considered the issue of cross-contamination or collusion. And while accepting that the lapse of seven years from recording the interviews with the children and the trial, presented challenges, he concluded that a court must guarantee a fair trial but cannot guarantee a perfect trial and he was satisfied that these were matters which the jury were entitled to take into consideration but did not render the trial unfair so as to cause him to exercise the inherent jurisdiction to stop the trial. With this we are in entire agreement.

137. Consequently, for the reasons stated, we are satisfied that the refusal to withdraw the case in terms of the principles in R v. Galbraith [1981] 1 WLR 1039 and POC v. The DPP [2000] 3 IR 87 was a legitimate exercise of the trial judge's discretion and we reject this ground of appeal.

Ground 6- Deficiencies in the Trial Judge's Charge Relating to Delay and Corroboration

Delay

138. The appellant contends that the judge failed to give any, or any adequate warning on delay, and in particular, failed to address in a meaningful and effective manner the delay that had occurred between the interviewing of the complainants and their cross-examination at trial. It is said that what the judge had to say was very cursory. He had commented:

> "The other matters, then, that I just should have raised when I was dealing with legal principles, and I suppose it's just slightly the unusual nature of this trial, not very unusual . . . but somewhat unusual. . . and that is that you had a complaint in 2011, going into 2012, in relation to the children, that the trial hasn't taken place now until early 2018, but that you actually saw the DVDs of the children where they were 12 and 10, and then a year later, in relation to JE, when she was a year older. And just there may be issues as to actual memories of the complainants of the incidents and memories that they have from DVD recordings. Now, that's perfectly legitimate, members of the jury. You can have . . . refresh your memory from looking at matters like the DVDs and both are legitimate forms of evidence, but obviously, the situation is that you know that can cause difficulties for the defence as well as dealing with it on that basis, I just wanted to make that clear."

139. Responding, the Director says that there was no real delay whatsoever in this case in the making of complaints by CE, and later, JE. They were under the effective control and dominion of the appellant until placed in foster care on 13th March 2011, and by the end of that month, CE had made a disclosure to Aoife Woods which was reiterated by her to a doctor when medically examined on 7th April 2011, to Gardaí at the clarification meeting on 14th April 2011, and in the later s. 16 interviews. So far as JE is concerned, she told Garda Peoples in April 2011 that she had things to tell but was not ready. She, too, was interviewed by a doctor on 7th April 2011, but denied that anything had happened to her. She was interviewed by specialist interviewers on 29th August 2011, but did not make disclosures on tape, though she had already provided a note to Gardaí saying that she had been abused. It is said that insofar as there was a time-lag between complaints and interviews and the matters coming for trial, part of that is down to the actions of the appellant in leaving Ireland and travelling to Chile.

Discussion – Delay Warning

140. In giving his ruling, the trial judge acknowledged that the issue of delay had, to a great extent, already been considered within the application at the conclusion of the prosecution's case, to withdraw the case from the jury. Nonetheless, he proceeded to reiterate the issues which he had considered, which included his finding that there was no delay in the complaint made by CE to the authorities. He was satisfied there had been a delay by way of a matter of months in respect of the complaint made by JE. He concluded, in the circumstances of the case that any delay in making the complaints, such as it was, was not an unreasonable one. With this conclusion, this Court agrees. The only outstanding issue therefore was the lapse of time of some seven years between recording the DVDs of interview and the cross-examination of the two central witnesses.

141. This is not a case of historical sexual abuse; this is a case where the complaints were made proximate to the allegations. It is clear from the evidence that no later than October 2014, the appellant was aware of the detail of the allegations being made against him. It is fair to say that emphasis was placed by counsel for the appellant on the period of time between the complaints and the interviews, and the evidence in court.

142. The trial judge was satisfied that no issue of specific prejudice had been pointed out to the Court and in the circumstances considered it appropriate in order to ensure a fair trial to highlight that the evidence was given at a remove of some seven years from the making of the complaints and the video recordings of the evidence.

Conclusion

143. As we have observed, this was not a case of historic sexual abuse. It was not a case where the complaints were made at a remove from the allegations forming the subject matter of the trial. On the contrary the complaints of both complainants were made proximate in time to the allegations themselves. Therefore, the requirement for a delay warning in terms of the jurisprudence was not a feature of this trial.

144. Nonetheless, the issue of concern was the fact that the evidence was given at some remove from the video recordings of the evidence. A period of some seven years had

elapsed which was undoubtedly a matter of some concern. Therefore, it was necessary for the trial judge to bring that factor to the attention of the jury. How the trial judge decided to do that was a matter entirely within his discretion on an assessment of the evidence at trial. In this respect whilst his comments were succinct, there was, in the view of this Court no necessity for the trial judge to elaborate on the difficulties that this presented to the defence. He was satisfied that the defence had not been deprived of the ability to cross-examine each of the complainants in a meaningful way. Nonetheless in order to ensure a fair trial for the appellant, the trial judge pointed out to the jury that a period of time had elapsed between the recording of the DVDs and the cross-examination, which had the capacity to cause difficulties for the defence. Prior to alerting the jury to this difficulty, the trial judge set out the relevant timeframes. Therefore, the jury were alert to the precise passage of time and were also alert to the fact that this could create difficulties for the defence. In our view, the trial judge addressed the issue in an appropriate manner in the context of the circumstances of the case.

Corroboration Warning

145. It is said that the judge erred in not giving a corroboration warning. While it is accepted that the giving of a warning is discretionary, it is said that the circumstances that were present lent very heavily in favour of the warning. It is said that was so because of the inconsistencies, lack of detail and the vagueness. Moreover, there was the risk of cross-influence and contamination, and in particular, the possibility of influence and contamination of the evidence of the younger sister. Moreover, it is said that this was a case that called for a specific cautionary instruction in respect of the evidence of children.

Discussion – Corroboration Warning

146. We now consider the issue of the trial judge's refusal to give a corroboration warning. It is well settled in our law that a decision as to whether or not to give a corroboration warning is a matter entirely within the discretion of the trial judge in accordance with s.7 of the Criminal Law (Rape) (Amendment) Act 1990, as amended. It is also well settled that where a trial judge exercises a discretion in a particular manner, this Court will not intervene unless it is apparent that such discretion was exercised in a manner which was manifestly unjust; *The People (DPP) v. KC* [2016] IECA 155.

147. In the present case, the trial judge determined that there was, as a matter of law, no evidence capable of corroborating the complainants' testimony. Therefore, the evidence of the complainants was uncorroborated. The argument advanced on behalf of the appellant was that the warning was desirable in circumstances where it was contended that aspects of the complainants' evidence was unreliable, lacking in detail, vague and contained inconsistencies. Moreover, the risk of influence and cross-contamination was raised on behalf of the appellant.

148. The appellant relies upon the decision of *The People (DPP) v. Hanley* [2018] IECA 173 as authority for the proposition that a corroboration warning is desirable where there are inconsistencies in testimony. However, the facts of *Hanley* are entirely different to the evidence in the present case. Lack of recall, vagueness or inconsistencies in testimony are not in and of themselves indicators of the desirability for a corroboration warning. They

may be factors which a court may take into account in deciding whether or not to give such a warning.

149. It is quite clear from a perusal of the transcript that the trial judge considered the issue as to whether or not to give a corroboration warning very carefully indeed. He found, as stated, that there was a matter of law no evidence capable of corroborating the testimony of either complainant. He considered the terms of s.7 of the 1990 Act and the evidence in the case. He concluded that CE was a coherent and clear witness. He accepted that there were inconsistencies in her testimony and that there was a lack of recall. As regards JE, the trial judge was of the view that she gave substantial detail in her evidence and that she was a clear and coherent witness. Moreover, in cross-examination he was satisfied that they emphatically only emphasised that they were sexually abused by the appellant. The trial judge went on to say: –

> "This case is also different from the type of case where this court would consider giving a corroboration warning, both in relation to children and in relation to corroboration in general. There is a wealth of independent supporting evidence in this case, some of which corroborate parts of the children's testimony, it's not corroboration in the classic sense. And I don't consider it at all appropriate for the reasons that I have set out to give a general corroboration warning. The judgement that Ms. Walley opened... But I strongly endorse the views against by Lady Justice Hallet, that children cannot be treated as adults. And that they may give coherent evidence and sometimes conflicting evidence, but one has to take into consideration that they are children. And for that reason, I do not intend to give a corroboration warning, either in general corroboration warning, or a warning in relation to the children's evidence. That's not to say that the difficulties that the defence appointed house would not be absent from the judges charge to the jury in fairness to Mr A."

Conclusion

150. In the present case, while there was no direct evidence capable in law of corroborating either complainant's testimony concerning the allegations themselves, there was evidence from a number of witnesses concerning aspects of the evidence given by each complainant.

151. The trial judge was in an unparalleled position in that he was able to observe not only the evidence given by each complainant but also the manner in which they gave their evidence. He was satisfied that the evidence of each complainant was coherent and clear. He recognised that there were inconsistencies in their testimony, however, that, in and of itself does not indicate that a corroboration warning is desirable. In the final analysis, it is quite clear that the trial judge exercised his discretion in a most careful manner having heard all the evidence. We are not satisfied that there is any basis to assert that the trial judge's ruling was incorrect in fact or in law. This Court is not of the view that he erred in the manner in which he exercised his discretion.

Discussion – Warning Regarding the Evidence of Children

152. Much of the foregoing paragraphs is apposite to a discussion regarding the evidence of children. Again, the trial judge is vested with the discretion as to whether or not to give such a warning in the context of any given case in accordance with s.28 of the Criminal Evidence Act 1992.

153. It is for the trial judge to assess the evidence and the demeanour of the child who is giving evidence at trial and it follows that as such the judge is best placed to decide as to the manner of the exercise of the discretion. The same principle applies as in the instance of a decision as to whether or not to give a corroboration warning, in that this Court is very slow to intervene with the exercise of the discretion on the part of a trial judge unless it is quite clear that such exercise was manifestly incorrect or unjust. Simply because a witness is a child does not mean that the testimony is untruthful. A witness must be assessed in the same manner as any witness is assessed and in the present case the trial judge was satisfied that the two witnesses were coherent and clear in their testimony. Again, he accepted that there were inconsistencies in their testimony but that this was a matter for resolution by the jury.

Conclusion

154. The trial judge's ruling in this regard was admirably thoughtful and clear and this Court can find no error in his determination.

155. Accordingly, we reject this ground of appeal.

Ground 7 – Replaying portions of the DVDs to the jury

156. During deliberations, the jury requested to view the DVDs of interviews of the complainants again. Counsel for the appellant sought to have the cross-examination of the complainants' recapped to the jury in light of such. In refusing to do so, the trial judge stated as follows:-

> "The jury have requested that they wish to look at some of the DVDs. The DVDs of the interviews, all six of CE and JE, pursuant to section 16 of the Criminal Evidence Act 1992 were made exhibits in the trial. There was no objection to that. There was no condition placed on it. The Court for the reasons outlined, because of the issues in this trial was at pains to do a very lengthy charge to the jury, two and a half days, where it went through the transcripts of all the interviews, went through every aspect of cross-examination of the main complaints, CE and JE. The only matters that were left out was really for some time purposes and questions that had been repeated, so everything of relevance was read to the jury. I agree with the submission by the prosecution that it would be an inappropriate trespass for the Court, once the jury have asked to view the DVDs, that I would insist then that I review and read again the copious evidence that the Court has read already in the course of its charge to the jury. It's a matter for the jury to decide how they deal with the exbibits and what part of it they wish to view and, in the circumstances, I'll await their request as to the specifics. They have to be told that it will be done in the courtroom."

157. The appellant submits that the trial judge erred in this regard as a manifest unfairness arose because the jury were essentially viewing the evidence in chief without the cross-

examination also being recapped. The appellant submits that it was still incumbent on the trial judge to remind the jury of the complainants' cross-examination, re-examination and, where appropriate, any part of the accused's own evidence.

158. The respondent submits that the trial judge was obliged to replay the requested portions of video for the jury and that it was not unusual in such a lengthy trial for evidence to be replayed.

159. The respondent accepts that a balance must be struck but it was not the duty of the trial judge to re-focus or re-direct the jury's deliberations away from the material that they had specifically requested. Rather, to read out the entirety of the cross-examinations of the complainants without a request would have been to trespass on the jury's function.

160. The respondent refers to *The People (DPP) v. PP* [2015] IECA 152 where the Court dismissed an appeal on the grounds*, inter alia*, that the trial judge erred in allowing the Section 16 DVD interview to go to the jury in the jury room as an exhibit in the trial in circumstances where the Court held no injustice or unfairness arose.

Discussion and Conclusion

161. In the ordinary course of trial, should the foreperson of the jury request the trial judge to remind the jury of evidence, the trial judge may read from the transcript of the evidence concerning the relevant witness or may read from the judge's notes of the evidence. In circumstances where the material of which a reminder is sought by the jury, is recorded material, it is contended on behalf of the appellant that it is necessary to remind the jury of the cross examination of witnesses where the DVD of the recording of the direct evidence is played for the jury.

162. It is important to observe in the present case that the jury specifically requested to view particular portions of the DVDs of interview. No request was issued to re-hear extracts from the transcript of the evidence concerning the cross-examination of the relevant witnesses.

163. In our view the issue is whether in re-playing only the nominated portions of the DVDs of interview any unfairness or injustice arose.

164. The integrity of the trial process must be preserved at all times. Once the jury requested that portions of the DVDs of interview be re-played, it was a matter at the discretion of the trial judge to decide whether to permit a re-play or not. In certain circumstances, it may be appropriate to simply re-cap the evidence from notes. However, in other circumstances, such as exist in the present case, where the trial was a most lengthy one, it can readily be seen why the trial judge had no hesitation in permitting a re-play of the designated material and indeed the concern expressed on the part of the appellant was that the cross-examination also be recapped by the judge.

165. Where the DVDs are re-played, certain safeguards are in our opinion required to be followed which include the re-playing of the DVD in the courtroom in the presence of the judge and the parties, which should take place without any intervention or interruption.

166. We do not agree with the contention on behalf of the appellant that it was then necessary for the trial judge to summarise again all or part of the cross-examination of the complainants. It is a matter to be determined on the facts and circumstances of each individual case. In the present case the trial judge had carefully summarised the evidence in a fair and balanced manner at the end of a very lengthy trial. Where certain portions of evidence are requested to be repeated by the jury, it is only necessary to give those portions to the jury. Should the jury request further material, it is a matter within the province of the jury to so request.

167. We are satisfied in the circumstances that re-playing portions of the DVDs without summarising again the cross-examination did not give rise to an injustice or unfairness to the appellant.

168. Accordingly, we reject this ground.

Ground 8 – Failure to re-charge adequately following requisitions

169. This ground is concerned with the trial judge's recharge. Following a lengthy charge to the jury, the trial judge heard requisitions and recharged the jury. The appellant argues that the trial judge did not deal adequately with certain requisitions made. The appellant identifies the following requisitions:-

In not explaining to the jury that the first disclosure of CE in foster care was not offered by the prosecution as a recent complaint but rather was introduced into the case by the defence.

- In not making clear to the jury in the context of Dr. Maeve McCormack's evidence that there was never any allegation against the Applicant in respect of other children and in particular the other children mentioned in her evidence as being due for examination by her on the same date.

- In refusing to revisit the David Tyler memo in relation to inconsistencies in relation to the testimony of CE.

- In refusing to revisit the direct evidence of Garda Yvonne Peoples in respect of the manner of introduction in interview of the allegation of JE that "he had sex with me".

- In responding to a prosecution requisition by reading to the jury a portion of the evidence of a Garda Miller wherein he recalled the Applicant telling him that CE was the daughter of his "partner" notwithstanding defence objection as there were no notes taken at the time.

170. The appellant submits that the cumulative effects of the failure of the trial judge to deal with the above requisitions is sufficient to undermine the appellant's conviction. The appellant refers to *The People (DPP) v. CC* [2012] IECCA 86 wherein O'Donnell J. stated at para 45:-

"In J.T. v. DPP [2008] I.E.S.C. 20 Denham J. (as she then was) applied what she described as the "omnibus principle" being that while none of the matters individually

would justify prohibiting a trial, the court must view the matter with regard to the cumulative effect of the concerns. While this principle was identified in the context of a claim for prohibition, there is no reason why it cannot also be applied in the context of an appeal from a conviction. It applies with particular force where the counts are interlinked and the prosecution relies on system evidence so that evidence in respect of one complainant is admissible in the counts relating to other complainants."

171. The respondent submits that the criticisms of the appellant are untenable as they are predicated on the idea that the trial judge ought to have acceded to every requisition made. In relation to the evidence of Dr McCormack, the respondent submits that the trial judge dealt with her evidence extensively and he refused to revisit such after a careful examination.

172. It is submitted on behalf of the respondent that each of the other complaints levelled against the trial judge's refusal of certain requisitions suffer from a similar hollow infirmity. The jury was repeatedly reminded that the disclosure of CE while in foster care was not corroborative; the issue of inconsistencies in the context of the David Tyler memo suggests that the appellant believes that the entirety of the evidence heard in the 40 odd day trial should have been read back to the jury, no matter how ancillary or minor the evidence, when there is no basis in law for such a claim. In relation to the criticism that the judge did not revisit the issue of how the words -"he had sex with me" came about in the section 16 interviews with JE; it is submitted that the evidence of Garda Peoples and the section 16 interviews together with the letters and drawings, as well as the extensive cross-examination of JE and Garda Peoples on these issues, had already been fully and extensively recited by the judge in his charge This evidence was also fully referred to by both counsel in their closing speeches; in addition, the jury requested during their deliberations to see the DVD interviews again, so the issue of the discussion as to how the words-"he had sex with me" came about was fully ventilated, and seen again by the jury on DVD. Finally, the complaint regarding the evidence of Garda Miller which was that the appellant had told him that CE was the daughter of his "partner" should not have been admitted because the officer had not noted this in his notebook is unstateable as matter of law. It was a direct conversation with the accused in circumstances where the law does not require that this be reduced to writing before the officer could give evidence of same.

Discussion and Conclusion

173. There can be no doubt but that the trial judge's charge was a most comprehensive one extending for a period in excess of two days. This was a very lengthy trial and the evidence was carefully summarised by the trial judge. It is readily apparent from a perusal of the transcript that the trial judge addressed the jury most carefully on the legal principles. Moreover, he addressed each of the requisitions in turn and re-charged the jury in respect of certain issues raised. The role of a trial judge is not to detail all aspects of the evidence, but to provide the jury with clear directions of law and to summarise the relevant evidence as the judge thinks fit.

174. In particular as regards the summary of Dr McCormack's evidence, the trial judge summarised the evidence most carefully indeed. It appears to this Court that he

highlighted the relevant evidence. He set out the evidence given in respect of the medical examination of both CE and JE. The summary of the evidence was entirely appropriate and comprehensive.

175. Furthermore, the trial judge distinguished the evidence of Aoife Woods from that of the account given to Dr McCormack and the complaint made to Garda Peoples. We are satisfied that the judge did not err in refusing to revisit that aspect of the charge.

176. In conclusion we have no hesitation in rejecting this ground of appeal. The charge was fair and comprehensive and clear.

Ground 9 – Failure to give a stronger warning in relation to press attention

177. On day 42, the last day of the trial, counsel for the appellant made an application to the Court seeking a warning to be given to the jury in relation to the media. This application was predicated on the media coverage surrounding the "Belfast rape trial" which was ongoing at the time. Counsel for the prosecution opposed the application on the basis that the jury were at a sensitive time of deliberations and the facts of the cases were not similar and took place in different legal systems. In choosing not to give the warning, the trial judge stated as follows:-

> "The jury were carefully charged. I don't consider it appropriate to recharge the jury in any way or to give them any further warnings. The issue in relation to the Belfast trial, it's important to state that it is outside the jurisdiction. We operate by different rules here. Also, the issues in that trial are completely different and I just don't think it would be in the interests of justice for me in any way to either recharge the jury on the general principles or to give them any specific warning on the issues that have arisen."

Submissions of the appellant

178. The appellant submits that the trial judge erred in failing to give the requested warning and in not canvassing the jury. The appellant refers to *The People (DPP) v. Keith Brady* (Reported in Irish Times 5th December 2018) where the jury was discharged in a murder trial due to adverse media commentary in relation to the defence of provocation broadcast on RTE's Primetime. The trial judge canvassed the jury and ascertained that some members had watch the show. As a result, the jury was discharged.

Submissions of the respondent

179. The respondent submits that the Belfast rape trial was entirely different from the facts of the present case and the appellant has failed to identify any real or potential danger which may be suffered as a result. The respondent notes that even where significant and persistent specific adverse pre-trial publicity has been identified, trials can still proceed with the application of fade factor and appropriate directions.

180. The respondent refers to *The People (DPP) v. Griffin* [2009] IECCA 75 where the Court refused an appeal on, *inter alia*, the grounds that the trial judge failed to adequately charge the jury as to adverse media coverage.

181. The respondent submits that the appellant's reliance on the decision of Stewart J. in *Keith Brady* is misplaced. Moreover, as the factual matrix of the Belfast rape case is so fundamentally different to the facts of the present case, to canvass the jury on such would have been improper, confusing and dangerous.

Discussion and Conclusion

182. The facts of this trial involving, as it did the sexual abuse of two minors under the care of the appellant were utterly different to the facts in the 'Belfast rape trial'. We are wholly satisfied that the trial judge properly dealt with the within application. The Court was requested to warn the jury, *inter alia*, not to permit themselves to be affected by criticisms of the jury system. It has for many years been the position that the courts view juries as robust and indeed it is the collective experience of this Court that juries are well aware of their role and the importance of the jury function. We are not persuaded in any way that the fairness of the trial or the safety of the verdicts were in any way affected by the judge's decision not to give the warning requested.

183. We have no hesitation in rejecting this ground.

Decision

184. Accordingly, as we have rejected each of the grounds of appeal, the appeal is dismissed.